

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 21, 2008

**JAMES E. FENTON, JR. a.k.a. CHRIS FENTON v. STATE OF  
TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2004-B-1241 Steve Dozier, Judge**

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**No. M2007-01661-CCA-R3-PC - Filed October 2, 2008**

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The petitioner, James E. Fenton, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief. The petitioner was convicted of especially aggravated robbery, a Class A felony, and sentenced to twenty years in the Department of Correction. On appeal, he argues that he was denied his Sixth Amendment right to the effective assistance of counsel, specifically arguing that trial counsel was deficient in failing to: (1) adequately prepare for trial; (2) thoroughly investigate an alibi witness; (3) adequately investigate the facts of the case; and (4) provide the petitioner with a copy of discovery. Though the petitioner's notice of appeal was not timely filed in this case, in the interest of justice, we elect review. After review, the judgment of the post-conviction court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

J. Chase Gober, Nashville, Tennessee, for the appellant, James E. Fenton, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The facts of the case, as established on direct appeal, are as follows:

On January 7, 2004, the victim, Lindell Graves, was preparing to leave his apartment when two men, one armed with a handgun, entered the residence, beat him, and took his money and jewelry. At trial, the victim testified that he heard a knock at the door, looked through the peephole, and saw two men standing in the hallway. The face of one of the men was obstructed by a box and the other man was wearing “clear frame glasses with little gold things on them and . . . a light brown scarf around his neck that came to [the very bottom of his chin].” As the victim opened the door, the two men “rushed . . . through the door,” knocking him “through the wall.” The victim recognized the man wearing the glasses and scarf as the [petitioner], with whom he had been acquainted for some time. He did not recognize the other man, who had “brown hair and a little moustache.” The [petitioner] struck the victim in the head with a nine millimeter handgun, threatened to kill him, and demanded his money. The other man searched his bedroom, tossing the furniture as he did so. When the victim claimed that he had no money, the [petitioner] hit him in the mouth with the gun, breaking his jaw and shattering his teeth. The two men robbed the victim of his coat, a gold chain, rings, a watch, and the cash from his pocket. During the attack, the [petitioner] remarked that the victim’s brother, Josh, had informed him that the victim had recently received a large income tax refund.

As he left the residence, the [petitioner] grabbed the victim’s cell phone and ordered him to lie on the floor for ten minutes. After a short time, the victim crawled to an upstairs apartment, where a neighbor called 911. As a result of the beating, the victim suffered continuous headaches and could not eat solid food for several months. At the time of the trial, he faced additional surgery and further treatment expected to cost upwards of \$10,000. A few days after the robbery, the victim telephoned the [petitioner], who denied participation in the robbery but said, “I kept the dude from beating your ass.” Several weeks after the offense, the victim identified the [petitioner] from a photographic lineup.

The victim admitted that he did not immediately identify the [petitioner] as one of the assailants, explaining that he was “dazed and confused” as a result of his injuries. While acknowledging that “Joshua” was listed in the police report as “suspect number one,” the victim denied telling police that anyone by that name had committed the robbery. The victim explained that during his initial interview with police, he made reference to his brother, Josh, because the [petitioner] had mentioned his name as his source of knowledge about the tax refund.

*State v. James E. Fenton, Jr. a/k/a Chris Fenton*, No. M2005-01761-CCA-R3-CD (Tenn. Crim. App., at Nashville, July 7, 2006). Following a jury trial, the defendant was convicted of especially aggravated robbery and sentenced to twenty years in the Department of Correction, to be served at 100% as a violent offender. A panel of this court affirmed the defendant’s conviction on direct appeal. *Id.*

The defendant subsequently filed a *pro se* petition for post-conviction relief alleging, among other grounds, that he was denied the effective assistance of counsel in violation of his Sixth Amendment right. Following the appointment of counsel, two amended petitions for relief were filed. A hearing was later held at which only the petitioner and trial counsel testified.

The petitioner testified that trial counsel was appointed to represent him at the general sessions level and continued to do so through the direct appeal process. According to the petitioner, he asked trial counsel to provide him with copies of discovery materials, but trial counsel failed to do so. The petitioner testified that he only received discovery after he filed a complaint with the Board of Responsibility and that he did not receive the materials until after trial. After viewing the discovery, the petitioner believed that certain materials could have been used to aid him at trial, specifically the 911 tape. On cross-examination, however, the petitioner acknowledged that he had heard the tape immediately prior to trial and stated that he instructed trial counsel he wanted the tape played but that trial counsel refused because he felt it was harmful to the case.

The petitioner also testified that trial counsel only visited him in jail on one occasion, that being the evening before trial. Moreover, according to the petitioner, when trial counsel met with him on court dates, trial counsel was rushed and did not spend enough time discussing the case. The petitioner further testified that he attempted to call trial counsel on multiple occasions but was only able to leave messages with trial counsel's secretary, which were not returned.

The petitioner testified that he informed trial counsel that he had an alibi for the time the crime was committed, specifically his employer. The petitioner stated that trial counsel failed to pursue this possible defense. He also stated that trial counsel failed to inform him that he would be sentenced at 100% if convicted as a violent offender, telling him only that he was looking at "a lot of time." He also testified that trial counsel did not hire an investigator and that several areas were not investigated sufficiently. Specifically, he testified regarding a starter pistol found in the victim's possession, the fact that the victim was on medication, previous problems in the relationship between the victim and the petitioner, and the identity of the second assailant.

Trial counsel testified and contradicted the petitioner's testimony on several points. According to trial counsel, he provided the petitioner with copies of discovery on two occasions, in addition to a third time after the complaint was filed with the Board of Professional Responsibility. He also testified that he sent the petitioner a copy of the statute which stated he would be serving the sentence at 100% if convicted. Trial counsel testified that he spoke with the petitioner multiple times on the telephone, exchanged written correspondence with him, and often spoke with the petitioner's sister about the case.

With regard to an alibi, trial counsel testified that the petitioner never informed him that his employer was a potential alibi witness. According to trial counsel, the petitioner initially informed him that he was at a wrestling match when the crime occurred. However, the petitioner later admitted that he was not there, so no alibi defense was pursued. Trial counsel testified that he conducted a preliminary investigation of the case by speaking with the detective. He also attempted

to speak with the victim, but the victim refused to speak with him. Trial counsel testified that he and the petitioner discussed trial strategy and felt that the best theory of defense was to attack the credibility of the victim based upon the discrepancies in the victim's identification of a suspect and his previous drug convictions. According to trial counsel, he cross-examined the victim with regard to these discrepancies and was "pretty tough" on him. Trial counsel also testified that he received a copy of the 911 tape only a few days prior to trial. He stated that he and the petitioner listened to the tape and, because it portrayed the victim's severe injuries, they made the decision not to utilize the tape.

After hearing the evidence presented, the trial court took the matter under advisement and subsequently entered a written order denying the petition on June 25, 2007. Thirty-one days later, on July 26, 2007, the petitioner filed notice of appeal.

### **Analysis**

On appeal, the petitioner raises the single issue of ineffective assistance of counsel. As an initial matter, the State asserts that this court lacks jurisdiction to hear the appeal because the petitioner filed an untimely notice of appeal. The State is correct that the notice of appeal, which must be filed within thirty days after the date of entry of the judgment appealed from, was not timely filed in this case, as it was filed thirty-one days after entry of judgment. *See* Tenn. R. App. P. 4(a). Nonetheless, the rules provide that "[i]n all criminal cases, the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). Despite the State's argument to the contrary, we conclude that the interest of justice dictates review in this case. In his reply brief, the petitioner's attorney filed an affidavit, which included the following statement:

Affiant asserts that although he is listed on the "cc" of the Judge Dozier's Order denying [the petitioner] Post-Conviction Relief, Affiant did not receive a copy of said Order through the mail and has only received an unsigned copy from the court. This unsigned copy was received on July 26, 2007. On this date, Affiant was advised by Judge Dozier's law clerk that the Order had been filed on June 27, 2007. Affiant filed the Notice of Appeal on July 26, 2007 under the impression that the Notice of Appeal was timely filed.

Based upon these facts, we elect review of the issue presented.

Next, the State contends that the petitioner has waived review of the issue presented, based upon his failure to support his assertions with either argument or citation to the record. *See* Tenn. Ct. Crim. App. R. 10(b) (stating that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court"); Tenn. R. App. P. 27(a)(7) (requiring the brief of an appellant to contain "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities

and appropriate references to the record”). Failure to comply with these rules will ordinarily constitute waiver of the issue. Tenn. Ct. Crim. App. R. 10(b); *see also State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000).

After review of the petitioner’s brief, we agree with the State that he has failed to comply with the above referenced rules. His entire argument, other than a recitation of general post-conviction law, is as follows:

In this case, [the petitioner] was denied his constitutional right to present a complete and competent defense because of trial counsel’s ineffective assistance of counsel. [The petitioner] was denied these rights largely through [trial counsel’s] failure to properly investigate the facts of [the petitioner’s] case prior to trial. Trial Counsel’s failure to investigate the facts and interview potential witnesses affected the outcome of the [petitioner’s] trial. It can not be argued that it was a “tactical decision” by trial counsel to not fully investigate the facts or interview potential witnesses. If anything counsel’s actions show a lack of “adequate preparation.” Had proper preparation occurred there is a reasonable probability the result of the proceeding would have been different.

Nonetheless, because the record before us is sufficient to allow review, in the interest of judicial economy, we elect to review the issue presented.

To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). The petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency. The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

It is unnecessary for a court to address deficiency and prejudice in any particular order or even to address both if the petitioner makes an insufficient showing on either. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. In order to establish prejudice, the petitioner must establish a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Id.* at 461. “[A] trial court’s *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise.” *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). However, *conclusions of law*, are reviewed under a purely *de novo* standard with no presumption that the post-conviction court’s findings are correct. *Id.*

On appeal, the petitioner specifically asserts that trial counsel was deficient in failing to: (1) adequately prepare for trial; (2) thoroughly investigate an alibi witness; (3) adequately investigate the facts of the petitioner’s case; and (4) provide the petitioner with a copy of discovery. In denying relief, the post-conviction court found as follows:

As to the argument regarding the notice of alibi, the Court accredits the testimony of trial counsel that petitioner never requested an alibi defense based upon his employer. In regards to discovery, the Court accredits the testimony of counsel that he provided petitioner all necessary discovery so as to be able to assist counsel during trial. Trial Counsel indicated he strategically determined the 911 tape would inflame the jury more than any potential benefit of any information regarding his initial identification of the shooter. Further, even if petitioner only received the 911 tape immediately prior to trial, he has not proven by the necessary standard that he was prejudiced.

As to trial counsel’s failure to hire an investigator to pursue a second defendant, to present additional witnesses as to the victim’s relationship and medication use, the Court finds trial counsel pursued the trial strategy he believed most effective in this case. After a review of the trial, the Court is of the opinion trial counsel extensively cross examined the victim as to all issues relative to the petitioner’s defense, including the victim’s possession of a starter pistol, the identification of the [petitioner], and his initial reporting of the crime. Petitioner has failed to present clear and convincing evidence trial counsel was ineffective in his defense, therefore the issue is dismissed.

Finally, petitioner presented the arguments in his petitions that trial counsel failed: to file appropriate motions in limine; to object to inappropriate evidence during trial; to adequately prepare for trial; to procure preliminary hearing transcripts; to answer his attempts at communication about the case; and to properly represent him at sentencing. . . . Petitioner failed to present proof of these arguments, therefore he has not met his burden of proving the allegations by clear and convincing evidence and those issues are dismissed.

The issues in this case were largely matters of credibility of the witnesses. Trial counsel argued the victim’s credibility, presented a viable defense, and the jury

chose not to accept his position. . . . Based upon the foregoing analysis, the Court is of the opinion the petition for post-conviction relief shall be denied. The petitioner has failed to show by clear and convincing evidence neither that counsel's performance was deficient nor that counsel was not functioning as guaranteed . . . by the Sixth Amendment and that the deficient performance prejudiced his cause. . . .

After a thorough review of the record, we find nothing to preponderate against the post-conviction court's findings. The post-conviction court specifically accredited the testimony of trial counsel that he provided the petitioner a copy of discovery and that he was not informed of the petitioner's employer as a potential alibi witness. The only proof supporting these two allegations was the petitioner's self-serving testimony, which materially contradicted that of trial counsel's. Issues of credibility of witnesses and the weight to be given their testimony are to be resolved by the trier of fact. *Henley*, 960 S.W.2d at 579. It is not the province of this court to reweigh such determinations. Moreover, the petitioner's alibi claim must fail based upon his failure to call such witness at the post-conviction hearing. *See State v. Black*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (when a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing).

We, likewise, find nothing in the record to preponderate against the trial court's finding that trial counsel adequately investigated the facts of the case. Trial counsel specifically testified that he spoke with the investigating officer and attempted to speak with the victim. Just as found by the trial court, based upon his investigation, trial counsel chose to pursue what he believed to be the best possible theory of defense. This was a matter of trial strategy that cannot be "second guessed" or judged in hindsight by this court. *Adkins*, 911 S.W.2d at 347. We further note that, as part of that strategy, trial counsel extensively cross-examined the victim with regard to several of the issues the petitioner now claims that trial counsel failed to investigate, such as the victim's possession of a starter pistol and the conflicts in the victim's identification of the perpetrators. Finally, we agree with the trial court that the petitioner failed to establish his claim with regard to whether trial counsel adequately prepared for trial, as no proof was presented at the hearing to support the assertion. As such, we must conclude that the petitioner has failed to establish his claim of ineffective assistance of counsel.

### **Conclusion**

Based upon the foregoing, the Davidson County Circuit Court's denial of post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE